Indiana Law Journal

Volume 54 | Issue 3 Article 5

Spring 1979

# Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech

Barbara Freedman Wand
*Indiana University School of Law*

# Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech

The growing number[1] of books, magazine articles, interviews and other forms of media presentations by those who have participated in crimes has prompted a public outrage that such persons should be allowed to reap voluminous profits as a result of their wrongdoing. The perception that there is something unjust in allowing a person to profit from an act which society condemns is strongest when the criminal act has resulted in personal physical injury to an innocent person. While the victim and his family have suffered and may face increased expenses from medical bills, the burden of loss of wages and support, or even the tragedy of loss of life, the criminal becomes rich as a result of the crime.[2] The media exposure itself, in addition to the expectation of profits, is seen by some as an incentive to would-be criminals to commit crimes.[3]

Society has responded in a variety of ways to the perceived injustice of allowing criminals-turned-authors to profit from their crimes. These responses include lawsuits initiated by members of the public to require the criminal to disgorge his profits[4] and statutes which redistribute the profits by seizing them from the convicted person and making them available to the victim of the crime and his dependents to cover expenses

---

[1]*See, e.g.*, S. ATKINS, CHILD OF SATAN, CHILD OF GOD (1977); C. COLSON, BORN AGAIN (1977); J. DEAN, BLIND AMBITION: THE WHITE HOUSE YEARS (1976); H. R. HALDEMAN, THE ENDS OF POWER (1978).

[2]When the wrongdoer in question is a public official who has betrayed the public trust, committed an illegal act, and then published a book detailing the incident, the public could be said to be the injured party whose trust has been violated and whose interests have been neglected by the wrongdoer. Where government funds are necessary to remedy the situation caused by the wrongdoing, every member of the public could claim injury. For example, the thousands of dollars spent during the Watergate hearings in the Senate were public funds.

[3]"By transforming a killer into a celebrity, the press has not merely encouraged but perhaps driven him to strike again—and may have stirred others brooding madly over their grievances to act." NEW YORKER, Aug. 15, 1977, at 21.

"We must take steps to make crime less attractive . . . ." Press Release from the Office of Assemblyman Jerry Lewis, February 27, 1978, at 2.

[4]*See, e.g.*, Jenkins v. The New York Times Co., No. 3106-78 (N.Y. Sup. Ct., filed Feb. 22, 1978). This suit, instituted by a New York secretary enraged by the fact that H. R. Haldeman, former White House Chief of Staff under President Richard M. Nixon, was profiting from a book revealing his inside knowledge of the "Watergate" scandal gained while he was a public servant, charges Haldeman with breach of trust and fiduciary duty owed to the United States Government and its citizens. The plaintiff is seeking an injunction preventing Haldeman from receiving any further pecuniary profit from the sales of the book, THE ENDS OF POWER, and an accounting as to all moneys received prior to the suit. All such moneys, and all future profits are to be paid into the General Treasury of the United States.

For a variant of the theme of public injury resulting from the wrongdoing of a public servant and a request for disgorgement of profits see United States v. Snepp, 456 F. Supp. 176 (E.D. Va. 1978).

incurred as a result of the crime. New York State enacted such a statute[5] in 1977. The statute, drafted in response to media speculation about the riches from publishing contracts awaiting the perpetrator of the "Son of Sam" killings,[6] requires those contracting with persons accused or convicted of certain crimes for the production of books, movies or other specified media presentations regarding the crime to pay to the New York State Crime Victims Compensation Board any moneys owing to the accused or convicted person.[7] The money is deposited in an escrow account where it becomes available, upon conviction of the accused person, to victims of crimes committed by that person who have recovered a money judgment against the convicted person in a civil action.[8]

The New York statute (hereinafter referred to as the anti-profit statute) raises several important questions regarding the constitutionality of such statutory attempts to correct the perceived unjust enrichment by means which have a significant impact on first amendment freedoms.

This note will analyze the statute in terms of the first amendment rights of both the accused person and the other contracting party, and will demonstrate that the statute, as enacted, is invalid. Potential due process challenges to the statute will also be considered.

Since legislation similar to the New York statute has already been considered by at least one other state[9] and will most likely be considered by others in the future, it is imperative that the constitutional issues raised by such a statute be discussed and resolved. It is the conclusion of this note that, while the interests sought to be served by such a statute are important and may even be considered by the courts to be compelling enough to justify incidental intrusion on constitutional rights, the statute in question is not narrow enough to serve only those valid interests, and significantly encroaches on first amendment freedoms.

## THE NEW YORK ANTI-PROFIT STATUTE AND ITS SETTING

The New York anti-profit statute, the title of which declares it to be concerned with the "[d]istribution of moneys received as a result of the

---

[5]N.Y. EXEC. LAW § 632-a (McKinney Supp. 1978). The statute, originally enacted in 1977, was amended in 1978. However, none of the amendments remedied the basic constitutional infirmities of the statute.

[6]In an interview in the New York Times, New York State Senator Emanuel Gold, sponsor of the bill, stated that "he developed the bill after reading a newspaper account during the hunt for the 'Son of Sam' stating that the killer 'stood to get rich' and that there would be people 'waiting at the precinct house to get him to sign a contract.'" N.Y. Times, Aug. 13, 1977 at 20, col. 3.

[7]N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1978).

[8]*Id.*

[9]California Assembly Bill No. 2635 (filed February 27, 1978). The bill died in the Criminal Justice Committee.

commission of crime"[10] actually accomplishes two separate tasks. It both prevents a criminal from receiving for his own use profits related in a specified way to his crime and, in addition, provides for compensation to victims of crimes committed by him. This latter goal of crime victim compensation is not a new one.[11] Several states, including New York, have enacted statutes providing compensation to victims of crimes.[12] However, these statutes represent schemes of *state* compensation to victims and are based upon the premise that crimes represent a failure on the part of the state to protect its citizens, thus leaving the state morally, if not legally, bound to compensate those injured as a result of those crimes.[13] The New York anti-profit statute providing for compensation directly from the criminal is therefore quite different from traditional crime victims compensation statutes. However, since both statutory schemes do provide compensation to victims of crimes, the New York anti-profit statute was included in the section of the New York Executive Law dealing with the more traditional state crime victim compensation system.[14]

For this reason, it is important in our analysis of the New York anti-profit statute to understand the operation of the New York system of state compensation to victims of crime, since by inserting the former system in the midst of provisions of the latter system, the New York legislature, whether intentionally or not,[15] made some of the definitions,

---

[10]N.Y. EXEC. LAW § 632-a (McKinney Supp. 1978).

[11]Goldberg, *Preface, Symposium—Governmental Compensation for Victims of Violence,* 43 S. CAL. L. REV. 1 (1970); Yarborough, *The Battleground for a Federal Violent Crimes Compensation Act: The Genesis of S.9, id.* at 94-99.

[12]According to a report prepared for the Law Enforcement Assistance Administration, as of the end of 1976, 18 states had enacted victim compensation programs. They are: Alaska, California, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Dakota, Pennsylvania, Tennessee, Virginia, Washington and Wisconsin. NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE. COMPENSATING VICTIMS OF VIOLENT CRIMES: POTENTIAL COSTS OF A NATIONAL PROGRAM (1977). Several foreign jurisdictions including New Zealand, England, Saskatchewan and Newfoundland in Canada, and New South Wales and Queensland in Australia, have also enacted such legislation. Goldberg, *supra* note 11 at n.1.

[13]Yarborough, *supra* note 11, at 94.

[14]The Crime Victims Compensation Board section of the New York Executive Law is to be found in N.Y. EXEC. LAW §§ 620-35 (McKinney 1972 & Supp. 1978). The anti-profit statute was added as § 632-a.

[15]It is the opinion of the author that incorporation of definitions, procedures, *etc.* which resulted from including the anti-profit statute in the middle of the New York Law's provisions regarding state compensation to victims of crimes was unintentional, since some of the provisions of §§ 620-35 of the Executive Law (the state compensation system) make little or no sense in the context of § 632-a (the anti-profit statute). For example, § 620 is a "[d]eclaration of policy and legislative intent" regarding Article 22 which is entitled "Crime Victims Compensation Board." Since part of Article 22 is § 632-a, one would assume that the policy and legislative intent set forth in § 620 would be applicable to § 632-a, as well as the other sections of the article. However, the declaration reads as follows:

procedures and restrictions of the state system apply to the anti-profit statute.

The New York system of state compensation to victims of crime vests power in a five-person board[16] to make awards to victims of crimes which have resulted in personal physical injury to the victim.[17] The statute sets out the criteria to be used in reaching these determinations, the basic criterion for an award being "serious financial hardship" to the claimant if an award is not made.[18] The original decision as to whether an award is to be made is rendered by one member of the board to whom the claim has been assigned by the chairman.[19] The statute provides for review of this decision by the full board[20] and by the Attorney General.[21]

In cases where the victim has died as a direct result of such crime, a surviving spouse, parent or child of a victim, or any other person dependent for his principal support upon a victim of the crime is eligible for an award.[22] Awards are to be made for reimbursement of "out-of-pocket ex-

---

> The legislature recognizes that many innocent persons suffer personal physical injury or death as a result of criminal acts. Such persons or their dependents may thereby suffer disability, incur financial hardships, or become dependent upon public assistance. The legislature finds and determines that there is a need for *government financial assistance* for such victims of crime. Accordingly, it is the legislature's intent that aid, care and support be provided *by the state,* as a matter of grace, for such victims of crime.

N.Y. EXEC. LAW § 620 (McKinney 1972) (emphasis added).

The anti-profit statute does not provide for *state* aid to victims of crimes. Thus the legislative intent and policy enunciated in § 620 clearly is not meant to apply to § 632-a (unless one concludes that *any* system of compensation enacted by the state or administered by the state is state aid, clearly a tortured definition of the term).

[16]N.Y. EXEC. LAW § 622 (McKinney Supp. 1978).

[17]N.Y. EXEC. LAW § 631(1) (McKinney Supp. 1978). "Personal physical injury" is not defined in the statute, an omission which leaves open the question of whether mental pain and suffering is including in the scope of the Statute. N. Y. EXEC. LAW § 621 (McKinney 1972).

[18]N.Y. EXEC. LAW § 631(6) (McKinney 1972).

[19]*Id.* at § 627.

[20]*Id.* at § 628.

[21]*Id.* at § 629.

[22]*Id.* at § 624. The statute exempts from eligibility for an award any person "criminally responsible for the crime upon which a claim is based or an accomplice of such person or a member of the family of such persons . . . ." *Id.* at § 624(2). This exemption, which seems to be directed at the prevention of collusion between criminals and their victims, has the unfortunate effect of making ineligible, for example, a wife who has been assaulted by her husband. Whether concern about collusion in such situations is realistic is questionable, and commentators have recognized that some alternative method for dealing with collusion is necessary. *See, e.g.*, Childres, *Compensation for Criminally Inflicted Personal Injury,* 50 MINN. L. REV. 271, 276-77 (1965).

An even more bizarre result in excluding potential recipients of awards obtains because of the definition of "family" for purposes of the statute. In § 621(4) of the law, "family" is defined as follows:

> 4. "Family," when used with reference to a person shall mean (a) any person related to such person within the third degree of consanguinity or affinity, (b) *any person maintaining a sexual relationship with such person, or* (c) *any person residing in the same household with such person.* (emphasis added).

Subdivision (b) of that definition when taken in conjuction with § 624(2), results in exempting from eligibility for awards those who maintained a sexual relationship with the

penses, including indebtedness reasonably incurred for medical or other services necessary as a result of the injury upon which the claim is based, together with loss of earnings or support resulting from such injury."[23] An award may not exceed twenty thousand dollars unless the excess is reimbursable from the federal government,[24] and if more than one person is entitled to an award as the result of the death of a victim, the Crime Victims Compensation Board is to apportion the award among them.[25]

The perpetrator of the crime need not be apprehended, prosecuted or convicted in order for an eligible person to apply for an award.[26] This is consistent with the underlying policy behind a system of state compensation for victims of crimes since the state's duty to its citizens injured as a result of lawlessness in the state is the same regardless of whether the criminal has been apprehended. In addition, the victim is in the greatest need of assistance when the perpetrator has not been found, since there is therefore no one against whom to bring a civil action. Even if the alleged perpetrator is found and convicted, the law does not require the victim to obtain compensation from the criminal by a civil action. Any award made, however, does subrogate the state to any right of action which the recipient may have to recover losses resulting from the crime.[27]

The same Crime Victims Compensation Board which administers the New York system of state compensation to victims of crimes also is the governmental body with responsibility for administering the distribution of funds under the anti-profit statute. The duties of the board in administering the latter program are of a much less discretionary nature, however, than their duties with respect to the former program. Under the anti-profit distribution program, it is a third party, who is neither a government official nor a victim nor criminally responsible for the crime, who must take the first step toward the distribution of moneys to

---

perpetrator or his accomplice. Subdivision (b) is at the outset a vague provision, *i.e.*, what comprises "maintaining a sexual relationship"? Is one act of intercourse enough? Even if the vagueness problems were not present, the operation of this section would allow an award to one girlfriend (who was otherwise eligible for an award) of a criminal who had assaulted her, but preclude an award to another girlfriend assaulted with the same severity on the basis of her sexual relationship with the criminal. It is difficult to argue that the possibilities of collusion are significantly stronger in the latter situation merely because of the existence of a sexual relationship. Proving the existence of a sexual relationship and using that information in an administrative hearing may also be violative of the right of privacy of those applying for awards under the system.

Under subdivision (c) of the definition of "family," those residing in the household of one criminally responsible for the crime would also be ineligible for awards. This exemption would result in allowing an award to a next-door neighbor (perhaps a child of the perpetrator or other eligible claimant) assaulted by a criminal, but denying an award to a boarder in the household, hardly a distinction which appeals to one's sense of justice.

[23]N.Y. EXEC. LAW § 631(2) (McKinney Supp. 1978).

[24]*Id.* at § 631(3).

[25]*Id.*

[26]N.Y. EXEC. LAW § 627(3) (McKinney 1972).

[27]*Id.* at § 634.

the victim of a crime. For when a third party (be it a "person, firm, corporation, partnership, association or other legal entity . . ."[28]) makes a contract with a person accused or convicted[29] of a crime in New York or with his representative or assignee "with respect to the reenactment of such crime by way of movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime,"[30] that third party becomes duty-bound under the statute to pay any moneys owing to the accused or convicted person under the contract to the Crime Victims Compensation Board and to submit a copy of the contract to the board.[31] The board is to deposit the moneys in an escrow account for the benefit of victims of crimes committed by the accused or convicted person or the legal representatives of such victims.[32] Distributions are made only if the accused person is eventually convicted of the crime.[33] In order to receive a distribution, a victim must bring a civil action[34] and recover a money judgment against the criminal or his representatives within five years of the date of the crime.[35] The money in the escrow account can then be used to satisfy the money judgment. The statute gives the board no discretionary power to decide whether a distribution should be made to a victim who has followed the proper procedures, and therefore the criterion of "serious financial hardship" to the claimant,[36] which guides the board in its decisions regarding the granting of awards under the system of state compensation is not operative under the anti-profit distribution system. In order to insure that potential beneficiaries of the

---

[28]N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1978).

[29]While the word "accused" is not defined in the statute, it probably would be construed to mean a formal accusation resulting in a criminal indictment.

[30]N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1978).

[31]*Id.*

[32]*Id.* It is interesting to note that under the anti-profit statute, only victims of crimes or their legal representatives appear to be eligible for distributions, while under the system of state compensation to victims of crimes, when a victim has died as the direct result of the crime, his spouse, children, parents, or others dependent for support upon the victim are directly eligible to apply for awards. *See supra* note 22 and accompanying text.

[33]*Id.*

[34]*Id.* It is unclear from the statute exactly what type of a "civil action" is contemplated. If, for example, a victim of an assault and battery brings a civil action for damages for assault and battery, the recovery might include not only out-of-pocket expenses for medical treatment and loss of wages, but also damages for pain and suffering. The question then becomes how much of that judgment can be satisfied from the escrow account, given that the system of state compensation to victims of crimes limits awards to out-of-pocket expenses, loss of earnings and loss of support. *See supra* note 23. Section 632-a is technically a sub-program of the more general system of state compensation to victims of crimes. Therefore are the limits on awards set forth in § 631 also applicable to distributions under § 632-a, or can the total amount of a civil judgment be recovered under the anti-profit statute?

[35]According to § 632-a(4), this five year period for the bringing of a civil action does not begin to run until an escrow account has been established.

[36]See *supra* note 18 and accompanying text.

escrow account are aware of its existence, the board is to publish legal notices in newspapers in the county of the state where the crime was commited and contiguous counties once every six months during the five year period to inform such persons of the fund.[37] The board is to pay over to the accused person any moneys in the escrow account upon dismissal of the charges or acquittal[38] or upon a showing that the escrow fund has been in existence for five years and that no actions are pending against the criminal pursuant to the statute.[39] During the five year period, if a court of competent jurisdiction so orders, the board shall pay moneys from the escrow account to the accused or convicted person after a showing that the moneys are to be used for the exclusive purpose of retaining legal representation at any stage of the proceedings against him, including the appeals process.[40]

## FIRST AMENDMENT CHALLENGE TO THE STATUTE

### *Protected Speech*

The event which triggers the applicability of the anti-profit statute is the making of a contract between two parties, one most probably a member of the press or a publisher and the other a person accused or convicted of a crime in the State of New York, for the expression of the latter's "thoughts, feelings, opinions, or emotions regarding such crime"[41] or for the reenactment of the crime via certain specified forms of media presentation.[42] There are, therefore, potentially two first amendment challenges to the statute, one by the party seeking to exercise his right to speak and another by the person seeking to publish the speech of the accused or convicted person. Whether either of these challenges will prevail depends first upon whether the speech covered by the statute is protected by the first amend-

---

[37]N.Y. EXEC. LAW § 632-a(2) (McKinney Supp. 1978). If the crime was committed in a county located in a city with a population of one million or more, notice by newspapers in that city is sufficient. *Id.*

[38]*Id.* at § 632-a(3). The statute provides, however, that an accused person found not guilty as a result of the defense of mental disease or defect pursuant to New York law is to be deemed a convicted person. *Id.* at § 632-a(5). This provision may itself raise constitutional questions since it inflicts a punishment upon a person who has been found to lack criminal responsibility for his act. According to New York law, a person cannot lawfully be punished for an act committed by him while insane. People v. Whitman, 149 Misc. 159, 266 N.Y.S. 844 (1933).

[39]*Id.*

[40]*Id.* at § 632-a(5).

[41]*Id.* at § 632-a(1). For a discussion ot a possible due process challenge to this wording in the statute, *see infra* notes 106-115 and accompanying text.

[42]The contracts within the scope of the anti-profit statute are those "with respect to the reenactment of such crime by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such accused or convicted person's thoughts, feelings, opinions, or emotions regarding such crime . . . ." *Id.*

ment is "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,' "[43] not all forms of speech have been found by the Supreme Court to come under the protection of the amendment. "[L]ibel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy"[44] have all been found by the Supreme Court to be outside the area of speech protected by the first amendment. Those areas excluded from first amendment protection do nothing to advance the central goal of the speech and press clauses of the first amendment: "to assure a society in which 'uninhibited, robust, and wide open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish."[45] While the subject of the speech covered by the anti-profit statute may be the commission of a crime, and thus seen as unworthy of first amendment protection, the statute is not limited in its scope to speech soliciting the commission of crime. Thus the above-mentioned exclusions to speech protected by the first amendment would not come into play to remove the speech from the protection of the amendment. In fact, the speech covered by the statute, which might include a criminal's delineation of how conditions in society led him to commit a crime, his repentance and reform following the crime, or his feelings and opinions about the criminal justice and penal systems, appear to be subjects of great public interest and importance and within the intended spectrum of speech sought to be protected by the first amendment in the furtherance of its goal "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' "[46] Since the statute has an effect[47] not only on the speech of persons eventually convicted of crime, but also on those who have been accused of committing a crime but who are later acquitted, the subject of the speech may also be an innocent accused person's denial of his guilt, surely also a subject worthy of first amendment protection.

Nor should the facts that the speaker is a person accused or convicted of a crime be seen as adequate grounds to withdraw the speech in question from the protection of the first amendment. If the purpose of the first amendment is to provide the public with information "from diverse and antagonistic sources"[48] to allow the public to make informed choices about matters of public interest,[49] then surely the view of one who is directly involved in the criminal justice system is of value to the public in

---

[43]Buckley v. Valeo, 424 U.S. 1, 49 (1976) (citations omitted).
[44]Konigsberg v. State Bar, 366 U.S. 36, 49 n. 10 (1961).
[45]424 U.S. at 93 n.127 (citations omitted).
[46]*Id.* at 49 (citation omitted).
[47]See *infra* notes 50-60 and accompanying text.
[48]424 U.S. at 49 (citation omitted) (emphasis added).
[49]"Free discussion . . . appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." Thornhill v. Alabama, 310 U.S. 88, 103 (1940).

determining what leads people to commit crimes (a necessary piece of knowledge for attempts to reduce the crime rate), and in efforts to improve criminal justice and penal systems.

*Infringement of First Amendment Rights*

Once it is determined that the speech which is the subject of the anti-profit statute is protected by the first amendment, one must then deal with the question of whether the statute infringes upon the first amendment rights of those persons affected by the statute: the accused or convicted person and the other contracting party. While there may well be some question as to the constitutionality of the anti-profit statute as applied to a person entering into a contract subject to the statute after his conviction, this note will deal primarily with the first amendment rights of persons accused of crimes and of the other contracting party. Since the statute affects these two classes of persons in different ways, the question of infringement on their first amendment freedoms will be treated separately.

The anti-profit statute does not prohibit an accused person from entering into a contract for the expression of his views regarding the crime of which he is accused or from expressing those views on his own. The statute controls the moneys owing to the accused person under any contract made for the expression of those views. Regardless of the disposition of the criminal charges, the statute requires the accused person to be deprived of the use of the money due him under the contract at least until final disposition of the charges. This deprivation infringes on the accused person's right of free speech.

The Supreme Court has held in a variety of contexts that it is not necessary for a statute to prohibit speech for that statute to be found to impair a person's exercise of his right of free speech.[50] Recently in *Buckley v. Valeo,*[51] the Supreme Court found unconstitutional on first amendment grounds a provision of the Federal Election Campaign Act of 1971 which restricted the amount of money a candidate could spend on political communications. This statute did not prohibit a candidate from airing his views by any method not involving the expenditure of money. However, the Court found that the effect of the limitation on political ex-

---

[50]*See, e.g.,* Schneider v. State, 308 U.S. 147 (1939), in which a Los Angeles municipal ordinance prohibiting the distribution of handbills to pedestrians on the streets was found violative of the first amendment, although the ordinance only prohibited *distribution* of information in certain places. *See also* Lovell v. Griffin, 303 U.S. 444 (1938) in which the Supreme Court found unconstitutional a municipal ordinance of Griffin, Georgia which prohibited distribution of literature without the written permission of the city manager. The Court in that decision stated: "The ordinance cannot be saved because it relates to distribution and not to publication. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' " (citation omitted) Lovell v. Griffin, 303 U.S. 444, 452 (1938).

[51]424 U.S. 1 (1976).

penditures was an impermissible restriction on the candidate's freedom of speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because *virtually every means of communicating ideas in today's mass society requires the expenditure of money.*[52]

Thus a statute which indirectly affects a citizen's ability to exercise his first amendment rights by limiting the amount of money he can spend to effectively communicate his views to others infringes on the citizen's first amendment right of free speech.

The New York anti-profit statute, while it does not prohibit the amount of money an accused person can spend in airing his views regarding the crime, does remove from the use and possession of the accused person one source of funds often used to defray expenses in preparing one's views for dissemination, *i.e.,* an advance against royalties paid to an accused person pursuant to a publishing contract. Since in many cases, the accused person will have no other source of funds to meet pre-publication costs such as research and clerical costs, the advance against royalties becomes particularly crucial to the accused person's ability to exercise his first amendment rights.[53]

Under the New York anti-profit statute all moneys owing to the accused person[54] under the contract must be paid to the Crime Victims Compensation Board. Even in the case of an accused person who eventually is found not guilty and who therefore receives back the advance against royalties previously held in the escrow account, the accused person has lost the use of the advance for what could be a lengthy period of time during which criminal charges are pending. This is the very period of time when he has the greatest need of the advance and the greatest need

---

[52]*Id.* at 19 (emphasis added).

[53]P. WHITTENBERG, THE PROTECTION OF LITERARY PROPERTY 262-63 (1978). While some might argue that freedom of speech is not denied by denying someone "freedom to have his speech published," the Supreme Court has recognized that effective communication depends upon widespread dissemination. In Associated Press v. United States, the Court stated that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." 326 U.S. 1, 20 (1945).

More recently in Buckley v. Valeo, the Court recognized that:

> Virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs . . . . The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication *indispensible instruments of effective political speech.*

424 U.S. 1, 19 (1976) (emphasis added).

[54]N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1978).

for exercising his freedom of speech in his defense.[55]

The Supreme Court has given some indication that a statute which has the effect of depriving a person of the resources necessary for effective speech may be violative of the first amendment. In *Buckley v. Valeo*,[56] the Court rejected a first amendment challenge to a provision of the Federal Election Campaign Act of 1971[57] that restricted the amount any one person or group could contribute to a candidate or political committee. The Court felt the restriction only marginally restricted the *contributor's* first amendment right to express support for a candidate.[58] However, the Court stated that a different constitutional question might be presented if the *effect* of the expenditure limitation were to prevent the candidate "from amassing the resources necessary for effective advocacy."[59] Such a result, the Court commented, "could have a severe impact on political dialogue."[60] It may be argued that in calling for the seizure of the accused person's advance against royalties, the anti-profit statute prevents that person from amassing the resources necessary for effective speech. Thus the anti-profit statute infringes upon the accused person's right of free speech.

The primary duty to act imposed under the New York anti-profit statute is imposed not upon the accused person, but upon the other contracting party, for by the terms of the statute it is that party who must pay to the Crime Victims Compensation Board any moneys owing to the accused person under the contract. This other contracting party will most probably be a member of the press or a publisher, both of whom are protected by the first amendment. Thus one must examine the effect of the statute on these parties to determine whether their first amendment rights are infringed by the statute.

It is unclear from the face of the statute whether any sanctions will be imposed upon a party who fails to comply with the mandate of the statute. Under the California version of the anti-profit statute,[61] introduced into the California State Assembly in February of 1978, the Crime Victims Compensation Board is authorized and required to institute proceedings to recover money which should have been paid to it pursuant to

---

[55]While § 632-a(8) requires the Board to return money to an accused person for the "exclusive purpose of retaining legal representation at any stage of the proceedings against [him], including the appeals process," this provision would not allow money to be returned to the accused person to help him meet expenses for the dissemination of his declaration of innocence. One of the most disturbing aspects of the anti-profit statute is that an innocent accused person's declaration of innocence is, under the wording of the statute, the accused person's "thoughts, feelings, opinions or emotions regarding such crime" and therefore within the scope of the statute. *Id.* at § 632-a(1).

[56]424 U.S. 1 (1976).

[57]18 U.S.C. § 608(b) (Supp. 1974).

[58]424 U.S. at 20-21.

[59]*Id.* at 21.

[60]*Id.*

[61]California Assembly Bill No. 2635, see *supra* note 9.

the statute if the other contracting party fails or refuses to do so.[62] In addition, if the other contracting party pays the money owing to the accused person directly to the accused person rather than to the Board, a penalty of twice the amount which should have been paid to the Board is levied against the other contracting party.[63] The penalty becomes a part of the Crime Victims Assistance Account.[64] While the New York statute makes no explicit provision for enforcement of the statute, it is quite probable that some regulatory mechanism would be devised to insure compliance. If the other contracting party paid to the accused or convicted person money owing to him pursuant to a publishing contract, the Board might still impose an obligation upon the contracting party to pay a sum equal to that amount to the Board. Since the statute is vague in its delineation of what contracts are to be affected by it,[65] the statute not only imposes the duty of paying certain moneys to the Board, but also of determining exactly what moneys must be paid to it.

"Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers."[66] The Supreme Court has found invalid as violative of the first amendment several different types of statutes which, while they did not directly restrict the press in its selection of material to publish or in its mode of distribution, did indirectly have the effect of restricting the right of the press in these areas. In *Grosjean v. American Press Co., Inc.*[67] the Supreme Court held unconstitutional a state statute imposing a license tax on the business of publishing advertising in publications with a circulation of more than twenty thousand copies a week. Although the statute did not prohibit any particular type of speech from being published nor directly restrict the circulation of publications, the Court found the tax an unconstitutional limit on freedom of the press because the effect of the statute would be to limit the press' exercise of its first amendment right by making widespread circulation more difficult (and hence less attractive) by making it more expensive. The New York anti-profit statute, by imposing on the press the duty of deciding when moneys are to be paid to the Crime Victims Compensation Board and the duty of actually paying such money to the Board makes the publication of a certain category of articles or books more difficult (and hence less attractive) for the press or book publishers. Rather than face the possible problems which might arise from entering into a contract with a person accused or convicted of a crime in New York, a publisher might avoid

---

[62]*Id.* at § 1(b).
[63]*Id.* at § 1(*l*).
[64]*Id.*
[65]See *infra* notes 106-15 and accompanying text.
[66]Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974).
[67]297 U.S. 233 (1936).

such contracts altogether. "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves."[68]

*Miami Herald Publishing Co. v. Tornillo*,[69] is another case in which the Supreme Court found unconstitutional a statute imposing a rather unorthodox burden on the press. That case involved a challenge to a Florida statute which grants a political candidate the right to equal space to answer criticism and attacks on his record made by a newspaper. Failure to comply with the statute was made a misdemeanor. The Court concluded that the statute was an unconstitutional abridgement of freedom of the press because it subjected the press to a penalty based upon the content of a newspaper. The penalty consisted of the cost of printing the reply of the candidate and the loss of space used by the reply which otherwise could be used for other material.[70] Thus, the penalty was not a prohibition of the publication of a certain type of material, the most blatant restraint on freedom of the press, but instead the penalty made the publication of certain subject matter less attractive to the press. This effect the court found impermissible. "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy."[71] Similarly, faced with potential liability for moneys which should have been paid to the Crime Victims Compensation Board, publishers might decide to avoid entering into publishing contracts with persons accused or convicted of crime in New York for publications regarding the crimes. Just as in the *Miami Herald* case, this should be found to be an impermissible infringement on freedom of speech and freedom of the press.

### *First Amendment Analysis*

Even if the New York anti-profit statute is found to infringe on the first amendment rights of either the accused person or the other contracting party, the statute may still be valid if it survives the "exacting scrutiny"[72] with which courts examine statutes which significantly encroach on first amendment freedoms. The Court must first examine the state interest sought to be furthered by the statute. It is not sufficient that the statute furthers some legitimate governmental interest.[73] The nature of the governmental interest which must be found has been

---

[68]*Id.* at 250.
[69]418 U.S. 241 (1976).
[70]*Id.* at 256.
[71]*Id.* at 257.
[72]Buckley v. Valeo, 424 U.S. 1, 64 (1976), *citing* NAACP v. Alabama, 357 U.S. 449, 463 (1958).
[73]*Id.*

described by the Court in a variety of ways: compelling,[74] substantial,[75] subordinating,[76] cogent,[77] strong.[78] In *Thomas v. Collins*,[79] the Court was somewhat more explicit in describing the showing a state must make with respect to its interest: "Only the *gravest* abuses, endangering paramount interests, give occasion for permissible limitation."[80]

Not only does the applicable constitutional analysis require that a compelling interest be served by a statute infringing on first amendment freedoms, but the state must demonstrate that the means employed are necessary to the accomplishment of that interest, that no alternative forms of regulation would combat such abuses without infringing first amendment rights.[81]

The New York anti-profit statute itself contains no declaration of policy or legislative intent through the reading of which one might be certain of the interests sought to be furthered by the statute.[82] Thus one must examine the legislative history to determine what interests may be served by the statutory scheme.

One interest proffered in support of a bill introduced in 1978 in the California State Assembly with provisions similar to the New York statute is the interest of the state in deterring persons from committing crimes. In a press release announcing the introduction of the bill in the California State Assembly, State Assemblyman Jerry Lewis is quoted as stating "[w]e must take steps to make crime less attractive and this legislation is a step in the right direction . . . ."[83] Quite clearly deterrence of crime is within the police power of the state and of crucial enough importance to be considered a compelling interest. However, it is not clear that the anti-profit statute is even rationally related to the furtherance of that interest. The deterrence argument, that by threatening to seize profits from books an accused person might write the state is deterring him from committing a crime, has at its basis the theory that the expec-

---

[74]NAACP v. Button, 371 U.S. 415, 438 (1963); *see also* Sherbert v. Verner, 374 U.S. 398, 403 (1963).

[75]NAACP v. Button, 371 U.S. 425, 444 (1963); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 464 (1958).

[76]Bates v. Little Rock, 361 U.S. 516, 524 (1960).

[77]*Id.*

[78]Sherbert v. Verner, 374 U.S. 398, 408 (1963).

[79]323 U.S. 516 (1945).

[80]*Id.* at 530 (emphasis added).

[81]Sherbert v. Verner, 374 U.S. 398, 407 (1963); Shelton v. Tucker, 364 U.S. 479, 487-90 (1960).

[82]Article 22 of the New York Executive Law, which contains the entire scheme of crime victim compensation for the State of New York does contain a declaration of policy and legislative intent. N.Y. EXEC. LAW § 620 (McKinney 1972). However, this section was enacted in 1966 when the system of *state* compensation to victims of crimes was enacted. The declaration is clearly inapplicable to the anti-profit statute since it states that "[t]he legislature finds and determines that there is a need for *governmental* financial assistance" for victims of crimes and that "it is the legislature's intent that aid, care, and support be provided *by the state* . . . ." *Id.* (emphasis added).

[83]Press Release from the Office of Assemblyman Jerry Lewis, February 27, 1978, at 2.

tancy of profits from books and other forms of media exposure regarding the crime is an operative incentive, inducing persons to commit crimes. There is little support for such an assumption.

Even if one adheres to the deterrence theory in its basic form, *i.e.*, that the threat of punishment deters criminals from committing crimes,[84] it does not necessarily follow that the anti-profit statute will have a deterrent effect. One of the criticisms of the deterrence theory in general is that severity of potential punishment alone has little deterrent effect unless there is a good likelihood that the criminal will be detected, prosecuted and punished.[85] Thus the variable of certainty affects the deterrent impact of a particular punishment. In the case of the anti-profit statute, there are additional variables which may mitigate the deterrent effect of the statute. For the statute to have any deterrent effect, the person contemplating committing the crime must, before the crime, contemplate writing a book about it or capitalizing by some other media presentation regarding the crime. It is questionable whether very many criminals have such plans before the crime has been committed, or even if they have considered such a possibility, that such plans, and the likelihood of their success, are significant factors in their deliberations as to whether or not to commit a crime. The statute will actually only affect a criminal who has entered into a contract subject to the provisions of the statute if the book or other media presentation is actually profitable, a prediction which is difficult to make before the crime.[86] In addition, while the statute affects all accused persons who have money owing to them under publishing contracts, the severest impact will be on persons who are convicted and against whom victims have recovered money judgments. Thus conviction and the ability of a victim to recover a money judgment against the accused person are two more variables which may lessen any deterrent effect the statute might have. Given all

---

[84]There is even some question as to whether punishment of *any* kind has a deterrent effect on would-be criminals:

> [T]he belief in the value of deterrence rests on the assumption that we are rational beings who always think before we act, and then base our actions on a careful calculation of the gains and losses involved. These assumptions, clear to many lawyers, have long since been abandoned in the social sciences . . . . Amongst criminals, foresight and prudent calculation is [sic] even more conspicuous by its [sic] absence . . . .

Gardner, *The Purposes of Criminal Punishment*, 21 MOD. L. REV. 115, 122 (1958).

[85] [C]ertainty, considered by itself, has a moderate deterrent effect for all crimes, while severity acting alone is not associated with lower rates of crime. When certainty and severity are combined . . . . then the impact of severity is filtered through the certainty value. This means that increasing severity in a condition of low certainty will have little effect on crime rates . . . .

Axtunes & Hunt, *The Deterrent Impact of Criminal Sanctions: Some Implications for Criminal Justice Policy*, 51 J. URBAN LAW 145, 158 (1973).

[86]Before the crime, it is difficult to know whether the crime will proceed according to plans. Any deviation from the anticipated course of events may make the story less suited to a dramatic rendition.

these variables, the deterrent effect of the anti-profit statute appears negligible.

Even if one concludes that the statute has some deterrent effect, the applicable constitutional analysis requires not only that the state interest and the means be rationally related, but also that the means be narrowly tailored to accomplish its purpose with the least possible intrusion on first amendment rights.[87] Any interest the state might have in deterrence would be satisfied by a statute that demonstrated that those who *committed* crimes had profits seized for the benefit of their victims. The statute as written sweeps more broadly, however, and punishes those who are accused of crimes and later exonerated by seizing their profits as well and holding them until final disposition of the charges.[88] At the very least, the scope of the statute must be narrowed to only affect those actually convicted of a crime.[89]

Another interest which the state may assert in support of the statute is an interest in punishing the reprehensible conduct of the criminal in (1) committing the underlying crime, or (2) in seeking to profit from that conduct by some form of media presentation. Since punishment already exists for the underlying crime, it is questionable whether an interest in increasing that punishment would be deemed a significant state interest, absent a showing that the already existing punishment is insufficient. If such a showing were made, the means chosen to increase the punishment should affect all persons convicted of such crimes. The New York anti-profit statute, in addition to being over-inclusive in affecting those accused of crimes who are later vindicated[90] is also underinclusive in that it affects only those criminals who have contracted for the production of some media presentation regarding the crime. Thus the statute cannot be justified on the basis of punishing those who have committed crimes resulting in personal injury to innocent victims, since it only punishes those who have committed such crimes and then contracted to tell about them for profit.

The state may see the attempt to profit from one's crime as such a

---

[87]"[E]ven though the governmental purpose be legitimate and substantial, that purpose may not be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960). In Police Dep't of Chicago v. Mosley, 408 U.S. 92, 101 n.8 (1971), the Supreme Court stated: "This standard . . . has been carefully applied when First Amendment interests are involved."

[88]N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1978).

[89]The argument that by including all accused persons within its scope the statute is unnecessarily broad and must be narrowed to affect only convicted persons is applicable regardless of what interest is asserted by the state in support of its statute, since there could be no valid interest in affecting those ultimately vindicated of any wrongdoing.

[90]*See supra* note 55 and accompanying text.

reprehensible act that the criminal should be punished for undertaking it. While such profit does not appeal to one's sensibilities as particularly praiseworthy, neither is the problem of a sufficient magnitude to qualify as one of the "gravest abuses, endangering paramount interests, [which] give occasion for permissible limitation"[91] when first amendment rights are involved.

If the purpose of the New York anti-profit statute is punishment, the statute does not comport with one of the basic objectives of a penal system, proportionality of punishment to the severity of the crime. "When two offenses come into competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less."[92] If the principle of proportionality were followed in the anti-profit statute, then regardless of whether what is being punished is the underlying crime or the act of the person in telling about it for profit, the effect of the statute on an accused person should depend upon the seriousness of his actions. While the anti-profit statute does affect accused persons with differing severity, the intensity of punishment does *not* depend on the reprehensibleness of the conduct in which the accused person was engaged. A well-written, thought-provoking book about a less severe crime may produce more royalties than a boring, badly written, poorly marketed book about a more severe crime. In such a case, the accused person who has committed the less severe crime will be punished (by loss of profits) to a greater extent than the person who has committed the more severe crime. One might consider a book by a criminal telling of his repentance about committing his crime and his rehabilitation or a book by an accused person asserting his innocence as less reprehensible than a book by a convicted person dramatically recounting the events surrounding his crime in a sensationalistic manner. The statute makes no distinction among these various types of media presentations in determining the severity of the punishment. All contracts for the "expression of such accused or convicted person's thoughts, feelings, opinions or emotions regarding such crime"[93] are subject to the statute regardless of whether those feelings and emotions are of repentance for one's actions or of pride in them. The statute is therefore not sufficiently narrowly drawn to accomplish any state interest based upon punishment.[94]

---

[91]Thomas v. Collins, 323 U.S. 516, 530 (1945).

[92]2 J. BENTHAM, *Principles of Penal Law,* Part II, in THE WORKS OF JEREMY BENTHAM 400 (J. Bowring ed. 1838).

[93]N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1978).

[94]The statute imposes another penalty on the accused person in addition to the seizure of his profits. As in the case of the seizure of profits, this additional penalty does not have an effect on the accused person which is proportional to the gravity of his actions.

The procedure by which a victim can receive the funds held in the escrow account is to bring a civil action and recover a money judgment against the accused person within five years of the date of the crime. N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1978). The money in the escrow account can then be used to satisfy the judgment. No particular form of civil action is specified in the statute. Therefore one assumes an ordinary tort action for

A third interest which the state may claim is furthered by the statute is the state's interest in aiding victims of crimes. While such an interest is indeed a significant one, New York already has a system for providing compensation to victims of crimes.[95] The anti-profit statute has for its beneficiaries the same persons who are already eligible for aid under the system of state compensation to victims of crimes.[96] The state system of crime victims compensation is in fact much broader in scope than the anti-profit statute, and the former therefore serves the interest of crime victims compensation more effectively than the latter. Under the system of state compensation, a victim may apply for an award even if the perpetrator of the crime remains unapprehended, where under the anti-profit statute, compensation can be obtained only (1) from the perpetrator, (2) after his conviction, and (3) after a money judgment has been obtained in a civil action. The state system fulfills the greater need in the area of victim compensation, since it is when the perpetrator remains unapprehended that the victim, having no one against whom to

---

recovery of damages suffered as a result of the personal physical injury is comtemplated by the statute. Since the New York statute of limitations for intentional torts is 1 year, N.Y. CIV. PRAC. § 215(3) (McKinney 1972), the anti-profit statute explicitly extends the statute of limitations to five years, exposing the accused person to civil liability for a longer period of time than other citizens who have committed similar torts. This is most certainly a penalty imposed on the accused person because of his exercise of first amendment freedoms.

In order to prevent the accused person from avoiding the effects of the statute by waiting until the five year limitations period has lapsed before contracting for the production of a media presentation regarding the crime, the anti-profit statute contains the following provision: "Notwithstanding any inconsistent provision of the civil practice law and rules with respect to the timely bringing of an action, the five year period provided for in subdivision one of this section shall not begin to run until an escrow account has been established." N.Y. EXEC. LAW § 632-a(7) (McKinney Supp. 1978). This provision suspends the tolling of the statute of limitations *indefinitely,* for if a person is convicted of a crime, serves the sentence imposed upon him on conviction, is rehabilitated, lives a productive life, and thirty years after the crime contracts to write a book about his life and the effect of the crime upon that life, the victim of that crime would then have five years, *thirty-five years from the date of the crime,* to bring a civil action against the convicted person. The statute is not clear as to the status of any money judgment obtained pursuant to the provision cited above, *i.e.*, whether a judgment obtained during this extended period of limitations may only be satisfied from the escrow account or whether it stands on the same footing as an ordinaryy money judgment which may be satisfied from the general assets of the person against whom it was obtained. Whatever the status of the judgment, it significantly penalizes the convicted person who chooses to contract for the production of a media presentation regarding the crime. The penalty is not directly related to the reprehensibleness of the convicted person's conduct, for the suspension of the tolling of the statute of limitations occurs regardless of the severity of the underlying crime and regardless of the amount of time which has elapsed since the commission of the crime of the actual content of the media presentation itself. For a judicial affirmation of the extension of the statute of limitations produced by the statute, see Barrett v. Wojtowicz, __Misc. 2d__, 404 N.Y.S.2d 829 (1978).

[95]N.Y. EXEC. LAW §§ 620-35 (McKinney 1972 & Supp. 1978).

[96]The word "victim" which is used in § 632-a, the anti-profit statute, to describe those for whose benefit the escrow account is to be established is defined in § 621(5) for the purposes of article 22 of the Executive Law which includes both the anti-profit statute and the system of state compensation.

bring a civil action, needs some alternative source of aid. The anti-profit statute is of marginal help to victims, aiding them only in recovering a previously obtained civil judgment. The state system is broader, too, in its definition of those eligible to receive awards since it allows a surviving spouse, parent or child of a victim who has died as a direct result of a crime, or other person dependent for support on the deceased victim to receive awards for loss of support. Under the anti-profit statute, only victims[97] of crimes or their legal representatives are eligible to receive moneys from the escrow account. Given the broader provisions of the system of state compensation to victims of crimes, it is difficult to see the necessity, in terms of aid to victims of crimes, of the anti-profit statute.

If the limitation on the size of awards is held not to apply to disbursements made pursuant to the anti-profit statute, the state may assert that the anti-profit statute increases the amount of compensation which some victims may receive to defray expenses incurred because of injuries suffered as a result of a crime.[98] It should be noted that the anti-profit statute will only serve this interest with respect to one relatively small sub-group of victims: those victims who were victimized by persons who have been apprehended, convicted, and who have contracted for the production of some media presentation regarding the crime.[99] The state may argue that the statute may deal with the problem of adequate compensation to victims of crimes in a piecemeal fashion, since

> [The Supreme] Court has frequently upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it . . . . *This presumption of statutory validity, however, has less force when a classification turns on the subject matter of expression. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content . . . .*[100]

The anti-profit statute classifies the speech which is subject to its provisions in terms of the subject matter of that speech. Therefore, the ordinary presumption that an underinclusive classification in a statute is valid may not be operative to justify the underinclusiveness of the

---

[97]See *supra* note 322 and accompanying text.

[98]N.Y. EXEC. LAW § 631(4) (McKinney Supp. 1978). It is unclear from the face of the anti-profit statute whether the limitation on the size of awards which is provided for in the system of state compensation to victims of crime is also applicable to disbursements made pursuant to the anti-profit statute. If the limitation is applicable, then the anti-profit statute would not provide victims with any additional funds, since any awards made by the system of state compensation must be reduced by any amount received "from or on behalf of the person who committed the crime."

[99]The eligible claimants, it should be noted, include not only victims of the crime which is the subject of the media presentation, but also victims of other crimes committed by the accused. For objections to that category of claimants, see *infra* notes 101-02 and accompanying text.

[100]Erznoznik v. City of Jacksonville, 422 U.S. 205, 215 (1975) (citations omitted), *quoting* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1971) (emphasis added).

statute. Thus, it may be impermissible, both under the equal protection clause, as well as the first amendment, for the state to attempt to increase the amount of money available for crime victims compensation by singling out and seizing only one source of funds, profits made by convicted persons, a source dependent upon the exercise of their first amendment freedoms.

Another possible interest which may be offered by the state in justification of the anti-profit statute is the correction of the fundamental unfairness of allowing a convicted person to profit from a media presentation regarding a crime, while the victim suffers hardship as a result of the crime. Thus the statute may be seen as channeling profits from the media presentation to the victim because the profits in some respect belong (or should belong) to the victim since they are derived from an event in which he owns some type of proprietary or equitable interest. The statute, however, is not drawn narrowly enough to express only that interest.[101] According to the statute, not only may the victim of the crime which is the subject of the media presentation obtain money from the escrow account, but all victims of other crimes committed by the accused person may obtain money from the escrow account if the other requirements of the statute are met.[102] These other victims obviously have no proprietary or equitable interest in profits from the media presentation regarding another crime committed by the accused person. Thus the statute is not drafted to narrowly transfer an interest in the profits to the victim of the crime which is the subject of the media presentation.

## DUE PROCESS CHALLENGES TO THE STATUTE

The anti-profit statute is also subject to constitutional challenges brought by both the accused person and the other contracting party on the ground that the statute violates the due process clause of the fourteenth amendment. Under the statute, the primary responsibility for determining when money owing to an accused person need be paid to the Crime Victims Compensation Board is placed by the statute upon the other party to the contract. Given the vague language of the statute[103] regarding the contracts which are subject to the statute, the determination as to exactly when moneys must be paid to the Board is a difficult one, which may be erroneously made. The New York statute provides no procedure by which an accused person whose profits have been paid to the Crime Victim Compensation Board may challenge that action on the grounds that the conduct giving rise to the profits was not within the

---

[101]See *supra* note 87.

[102]N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1978).

[103]For a discussion of the possible due process vagueness challenge to the statutes, *see infra* notes 106-16 and accompanying text.

bounds of the statute.[104] Thus the statute gives power to a private citizen to make the determination as to whether the accused person is to have the use of his money or whether it should be turned over to the government for the benefit of others. Such a statutory scheme most certainly involves the taking of the accused person's property without due process of law.[105]

Furthermore, it is unclear whether any sanction may be imposed upon a party who does not remit to the Board moneys which should have been so remitted. However, it is quite possible that, in order to make the statutory scheme work, some form of penalty might be imposed upon a contracting party who does not comply with the statute.[106] At the very least, the contracting party may be liable to the state for the amount of money that should have been paid to the Board. Given this possibility, the statute becomes analogous to a criminal statute in that it attaches a penalty to a course of conduct (or deviation from a course of conduct) which is defined by statute. The due process clause requires that the definition of proscribed conduct be clear and specific enough that men of common intelligence are not required to guess at the meaning of the enactment.[107] There are several reasons why such specificity is required. If one assumes that citizens shape their conduct in such a way as to steer clear of unlawful conduct, laws must be defined clearly enough to guide citizens in choosing lawful rather than prohibited activity.[108] Laws which are vague and do not clearly define proscribed conduct also lead to the possibility of arbitrary and discriminatory enforcement by those charged with such a duty.[109] In cases where a vague statute prohibits conduct which " 'abut[s] upon sensitive areas of basic first amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms.' Uncertain meanings inevitably lead citizens to ' "steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked.' "[110] This last effect of vague statutes is perceived as such an undesirable result that when vague laws deal with an area "permeated by first amendment interests"[111] a very high degree of specificity of

---

[104]The proposed California anti-profit statute, Bill No. 2635(c), introduced in the California Assembly in 1978, provides for a judicial determination as to whether sums received by the board shall be held by the board. All interested parties, including the accused person are permitted to present evidence at such hearing.

[105]Bill No. 2635 was a revised version of a bill on the same subject introduced the year before in the California legislature. The earlier bill did not provide for the hearing process to determine the propriety of the Board's retaining the accused person's profits and was therefore attacked on due process grounds. Press Release from the Office of Assemblyman Jerry Lewis, February 27, 1978, at 1.

[106]See *supra* notes 61-65 and accompanying text.

[107]Winters v. New York, 333 U.S. 507 (1948).

[108]Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

[109]*Id.*

[110]*Id.* at 109 (footnotes omitted).

[111]Buckley v. Valeo. 424 U.S. 1, 41 (1976).

language is required before a statute will be allowed to stand.[112]

The language in the anti-profit statute which describes the types of contracts which come within its purview is subject to a due process vagueness challenge. The other contracting party is directed to pay to the Crime Victims Compensation Board moneys owing to the accused person under contracts "with respect to the reenactment of such crime, by way of a movie, book, magazine, article, tape recording, phonograph record, radio or television presentation, live entertainment of any kind, or from the expression of such person's thoughts, feelings, opinions, or emotions regarding such crime . . . ."[113] The other contracting party may encounter several difficulties in determining according to this language when moneys must be paid to the Crime Victims Compensation Board, and if so, how much should be paid.

One is faced with the difficult task of defining the limits of the phrase "the expression of such accused or convicted person's thoughts, feelings, opinions, or emotions regarding such crime." Exactly, how narrowly or broadly is the phrase "regarding such crime" to be read? If the accused person recounts his childhood experiences and relates them to his commission of the crime, is the entire discussion "regarding such crime"? If a person writes a book or magazine article denying that he has committed any crime, are his words to be interpreted as his opinion regarding the crime? If a person criticizes the criminal justice system and uses as an example the handling of his case, are his opinions to be considered opinions "regarding such crime"? It is evident from these hypothetical questions, that a wide variety of conduct *might* fit the nebulous description of expression which will bring a contract within the purview of the statute. Whether or not a particular type of expressive conduct is meant to subject a contract to the requirements of the anti-profit statute is unclear, given the vague language of the statute.

The other contracting party also faces the dilemma of determining how much money must be remitted to the Crime Victims Compensation Board. For example, if a convicted person contracts to write his life story, and only one of the ten chapters mentions the crime, must *all* the money owing to the convicted person be paid to the Board or only one-tenth of the money? The language of the statute imposes a duty on persons contracting for specified conduct and mandates that moneys owing to the person "by terms of such contract" shall be paid to the Board. If a contract concerns more than one subject, must all money to be paid to the accused person be remitted to the Board or only money which can be attributed to the conduct specified by the statute?[114]

---

[112]Erznoznik v. City of Jacksonville, 422 U.S. 205, 217-18 (1975); Smith v. Goguen, 415 U.S. 566, 573 (1974); Cramp v. Bd. of Pub. Instruction, 368 U.S. 278, 287-88 (1961); Smith v. California, 361 U.S. 147, 151 (1959); NAACP v. Button, 371 U.S. 415, 438 (1963).

[113]N.Y. EXEC. LAW § 632-a(1) (McKinney Supp. 1978).

[114]That this entire discussion has been framed in terms of questions illustrates the impermissible vagueness of the statute.

Given the vagueness of language, a contracting party has very little guidance as to what types of contracts are subject to the statute. To avoid any possible liability for not remitting moneys to the Board when it had the responsibility to do so, a publisher might very well refrain from entering into any publishing contracts with persons accused of crimes. Such avoidance of conduct which may be constitutionally protected in order to steer clear of conduct which is the subject of the statute is exactly the type of "chilling effect"[115] which is sought to be eliminated by holding vague statutes unconstitutional.

## CONCLUSION

The New York anti-profit statute infringes upon the first amendment freedoms of both the accused person and the other contracting party. Several state interests which might be asserted by the state as compelling enough to justify infringement of first amendment rights have been discussed, and the statute has been analyzed with reference to these interests. All of these interests are either already being adequately served by the state without the aid of the anti-profit statute or can be served by alternative means which do not have such a significant impact on first amendment freedoms. To deprive the accused person of the ability to express his views and to fetter the other contracting party with such burdensome responsibilities that it will avoid publishing the speech of the accused person penalizes not only the accused person and the other contracting party, but also society as a whole. "In the traditional theory, freedom of expression is not only an individual but a social good. It is, to begin with, the best process for advancing knowledge and discovering truth."[116]

Challenges to the statute on the basis of violation of the due process clause have also been discussed. The method by which the accused person's money is siphoned to the escrow account amounts to deprivation of property without due process of law. The other contracting party may also challenge the statute on the ground that the wording of the statute is impermissibly vague in violation of the due process clause.

While the anti-profit statute might be seen as a basically laudable attempt to correct the injustice of allowing a criminal to profit by a crime which has resulted in injury to an innocent person, the constitutional challenges presented herein demonstrate that the effects of the statute may ultimately harm rather than protect society, for "the right of *all* members of society to form their own beliefs and communicate them *freely* to others must be regarded as an essential principle of a democratically-organized society."[117]

BARBARA FREEDMAN WAND

[115]Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965).

[116]Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963).

[117]*Id.* at 883 (emphasis added).